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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. RICARDO RAY ALCALA, Defendant and Appellant.	G052093 (Super. Ct. No. 12CF3455) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Gary S. Paer, Judge. Affirmed in part and reversed in part with directions.

Sharon G. Wrubel, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Charles C. Ragland and Allison V. Hawley, Deputy Attorneys General, for Plaintiff and Respondent.

I. INTRODUCTION

Ricardo Alcala was being prosecuted for the special circumstance murder of Edgar Sura, whose only fault was to have been found riding a bicycle after midnight in the territory of a gang that was a rival of Alcala's. Alcala's girlfriend of three months had already been arrested for Sura's murder and had turned state's evidence. Under a use immunity agreement she had given damning testimony linking Alcala and two fellow gang members to Sura's shooting on the night of October 19, 2012.

Alcala's trial attorney thus faced the difficult task of defusing the girlfriend's evidence. It was excruciatingly obvious the girlfriend's testimony alone was enough to convict his client. So Alcala's trial counsel decided to salvage something from the situation by specifically requesting not just one, but two jury instructions, each to the effect that the jury could not convict his client based on the girlfriend's testimony alone – doubling the emphasis on the fact her testimony was less reliable than others. Each instruction meant telling the jury the obvious – that the girlfriend was an accomplice to the crime – but the jury had probably already figured that out, since she had appeared in court in a blue jail jumpsuit and had testified she was still liable to prosecution for Sura's murder. It was a reasonable strategy.

Trial counsel's gambit was, however, not successful. As we explain below, there was enough evidence, independent of the girlfriend's testimony, to convict his client, and Alcala was indeed convicted of the first degree murder of Sura. In fact, the evidence was so clear that on appeal Alcala's appellate counsel is reduced to arguing the trial court's instructing the jury the girlfriend was an accomplice to the crime was error, or at least the product of ineffective assistance of counsel. While we sympathize with appellate counsel, tasked with making bricks without straw, we must reject the argument and affirm the judgment of conviction.

Both sides are in agreement, however, that the order of restitution to Sura's family (for about $7,000 in funeral expenses and mental health treatment) should reflect

it is a joint and several obligation that includes not only Alcala, but one of the gang members who was present at the shooting and – unsurprisingly – the girlfriend, too. The trial judge wanted the restitution order to so reflect, but an error crept in between sentencing and the filing of the abstract of judgment. Accordingly, we reverse with directions to the trial court to correct the abstract of judgment so that it clearly reflects the judge's ruling to include not only Alcala, but Isaac Martinez and the girlfriend as liable on the restitution order.

II. FACTS

Edgar Sura was shot on October 19, 2012. By the end of November 2012, the district attorney's office had filed a special circumstance felony complaint, based on a murder committed for a gang purpose. The complaint alleged that Isaac Martinez, Ricardo Alcala, and Alcala's girlfriend were responsible for Sura's murder. The girlfriend was arrested about that time. However, by the time Alcala's trial came up in April 2015, both Martinez and the girlfriend had been severed out of the case, and he went to trial as the sole defendant.

He did not testify in his own defense. In fact, there were no defense witnesses at all. This appeal instead centers on three prosecution witnesses: the girlfriend, an informant, and a firearm and ballistics expert who works for the Santa Ana Police Department.

A. *Evidence*:

The girlfriend: The prosecutor made sure, right from the start, that the jury knew the girlfriend had been arrested for Sura's murder. He pointed out she was wearing an Orange County jail woman's blue jumpsuit. And, though the girlfriend was still facing murder charges herself, he also made clear the girlfriend was testifying under a use immunity agreement which provided that nothing she said in the proceeding – with the exception of perjuring herself – could be used against her.

The girlfriend's testimony covered the events of the evening of October 18, and after midnight on October 19, 2012. She and Alcala were at a party in territory claimed by the 5th Street Diablos. Alcala asked the girlfriend if "we can go for a drive" and the girlfriend, Alcala, and two other Diablos members, Isaac Martinez and an individual named Jaime (the girlfriend could not recall his last name), hopped into her four-seater Nissan pickup. Jaime drove. They went to some nearby apartments, where the three men got out, looked around for 10 minutes, then got back into the pickup and returned to the party.

Later that evening, Alcala again asked the girlfriend to go for a drive. Again the same four people climbed into the girlfriend's pickup, except this time the girlfriend drove. The vehicle went into territory known to the group to be claimed by a rival gang, "17th Street." The Diablos members typically referred to members of the 17th Street gang as "cheesers."[1]

Past midnight, the group saw an individual on a bicycle riding away from them. Alcala asked, "Is that a cheeser" and the girlfriend was directed to stop the car. She parked it on a street near 17th Street (a major avenue in Santa Ana) and turned off the ignition. Again the three males got out of the vehicle.

About 30 seconds later the girlfriend heard three to five gunshots. The three males then came back to the car – first Jaime, then Martinez, then finally Alcala. The girlfriend did not see any of them with a gun. Alcala returned with a single flower, which he gave the girlfriend and said, "Let's get out of here." As the girlfriend started up and they drove away, Alcala asked his male compatriots, "Did we get him." The four returned to the party, and later the girlfriend dropped off Alcala at an undescribed residence.

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[1] The online Urban Dictionary provides a variety of definitions for the term – for example, a gamer who uses unoriginal moves or simply a person who smiles a lot. Other than the girlfriend's direct testimony that the Diablos used "cheeser" as a synonym for a 17th Street Gang member, we cannot explain the term.

The next day Alcala asked the girlfriend if there had been a news story about the shooting. She texted Alcala an Orange County Register article about it. Days later, he told her he wanted to leave the area and "go on the run." She obtained a hotel room for him. When she saw Alcala a month later in that room, he was in the company of fellow 5th Street Diablos members.

The informant: Unbenownst to members of the 5th Street Diablos, another person attending the party of October 18-19, was a convicted drug dealer who had become a confidential informant for a Garden Grove police detective. The informant related a conversation she heard from an open kitchen window after the second sortie by Alcala's group. Alcala was talking to his friends. We "caught some fool slipping," Alcala said, laughing. He acknowledged the victim "wasn't from nowhere" – gangspeak for unaffiliated – but said, "they still shot him."

After the informant heard about the shooting "in the news," she contacted her handler back at the Garden Grove Police Department to tell him she believed she knew who was guilty of the crime. Her departmental liaison then had her set up a sting of Alcala in which she would pay Alcala for the murder weapon.

The operation went as planned. The informant met with Alcala and told him, "You need to get rid of the gun." Alcala agreed. The informant got money from her contact at the police department, and met Alcala at a garage. She gave him money. He gave her the gun. She gave the gun to the police. Later both Alcala and the informant were arrested at the hotel which the girlfriend had set up for Alcala.

The ballistics expert: A number of cartridge casings were found at the scene of Sura's murder. A ballistics expert testified these casings came from the gun which the informant had obtained from Alcala.

B. *Jury Instructions*

The girlfriend featured prominently, by name, in the instructions to the jury. First came an instruction on "single witness testimony," in which the judge told the jury the testimony of "only one witness can prove any fact" – *except* for the testimony of the girlfriend. As for her, he said that if the jury decided she was an accomplice, supporting evidence was needed to prove a fact beyond her testimony.

And just a few moments later, the judge removed the possibility of the jury *not* finding the girlfriend was an accomplice by reading CALCRIM No. 335. The judge introduced the instruction with the remark, "Okay. This deals with accomplice testimony, and this deals with [name of girlfriend]." CALCRIM No. 335 told the jury that if the crime of murder or voluntary manslaughter had been committed, the girlfriend was to be considered an accomplice to those crimes.[2]

After some more instructions, the court came to the allegation of special circumstance, based on a killing by a street gang member. At this point the judge mentioned the girlfriend again, this time giving CALCRIM No. 708, which reiterated, in

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[2] "If the crime[s] of Murder or Voluntary Manslaughter were committed, then [name of the girlfriend] was [an] accomplice to those crime[s].

"You may not convict the defendant of Murder or Voluntary Manslaughter based on the (statement/ [or] testimony) of an accomplice alone. You may use the (statement/ [or] testimony) of an accomplice to convict the defendant only if:

"1. The accomplice's (statement/ [or] testimony) is supported by other evidence that you believe;

"2. That supporting evidence is independent of the accomplice's (statement/ [or] testimony);

"AND

"3. That supporting evidence tends to connect the defendant to the commission of the crime[s].

"Supporting evidence, however, may be slight. It does not need to be enough, by itself, to prove that the defendant is guilty of the charged crime, and it does not need to support every fact (mentioned by the accomplice in the statement/ [or] about which the witness testified). On the other hand, it is not enough if the supporting evidence merely shows that a crime was committed or the circumstances of its commission. The supporting evidence must tend to connect the defendant to the commission of the crime.

"Any (statement/ [or] testimony) of an accomplice that tends to incriminate the defendant should be viewed with caution. You may not, however, arbitrarily disregard it. You should give that (statement/ [or] testimony) the weight you think it deserves after examining it with care and caution and in the light of all the other evidence."

the special circumstance street gang killing context, the need for additional support beyond the girlfriend's testimony.[3]

There is no question Alcala's trial counsel specifically requested the two standard jury instructions, CALCRIM Nos. 335 and 708, which told the jury the girlfriend was to be considered an accomplice to the crime – assuming of course the jury found there was a crime. In making the record clear that Alcala's defense counsel had both requested and agreed to these instructions, the trial judge noted that giving both CALCRIM Nos. 335 and 708 was overkill. He was giving both out of "caution."[4]

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3 "In order to prove the special circumstance of Killing by Street Gang Member, the People must prove that the defendant committed Active Participation in Criminal Street Gang. The People have presented the (statement[s]/ [or] testimony) of [name of the girlfriend] on this issue.

"If the crime of Active Participation in Criminal Street Gang was committed, then [name of the girlfriend] was an accomplice to that crime.

"You may not find that the special circumstance of Killing by Street Gang Member is true based on the (statement[s]/ [or] testimony) of an accomplice alone. You may use the (statement[s]/ [or] testimony) of an accomplice to find the special circumstance true only if:

"1. The accomplice's (statement[s]/ [and] testimony) (are) supported by other evidence that you believe;

"2. That supporting evidence is independent of the accomplice's (statement[s]/ [and] testimony);

"AND

"3. That supporting evidence tends to connect the defendant to the commission of Active Participation in Criminal Street gang.

"Supporting evidence, however, may be slight. It does not need to be enough, by itself, to prove that the defendant committed Active Participation in Criminal Street Gang, and it does not need to support every fact (mentioned by the witness in the statement/ [or] about which the witness testified). On the other hand, it is not enough if the supporting evidence merely shows that a crime was committed or the circumstances of its commission. The supporting evidence must tend to connect the defendant to the commission of Active Participation of Criminal Street Gang.

"Any (statement/ [or] testimony) of an accomplice that tends to incriminate the defendant should be viewed with caution. You may not, however, arbitrarily disregard it. You should give that (statement/ [or] testimony) the weight you think it deserves after examining it with care and caution and in light of all the other evidence."

4 "The Court: Okay.

"Also, I do want the record to reflect that we spent a lot of time on CALCRIM [No.] 708, which deals with special circumstances accomplice testimony corroboration.

"The court is already giving [CALCRIM No.] 335 which is entitled 'accomplice testimony.' *No dispute whether witness is accomplice*, and this is your basic instruction that what the accomplice says must be corroborated. Okay. [CALCRIM No.] 335 really is kind of a general instruction.

"In our case, we have a special circumstance alleged, which is killing by street gang member. That is a special circumstance. There is an instruction for accomplice testimony dealing with special circumstances, and it was the court's position that [CALCRIM No.] 335 may not be enough, especially when we're talking about the special circumstance of killing by street gang member, which is very specific and which incorporates the crime of active participation in criminal street gang, which in our case is count 3.

C. *The Conviction and Appeal*

Alcala was convicted of murder, possession of a firearm by a felon, and street terrorism. He was sentenced to life imprisonment without possibility of parole. On appeal, his appellate counsel focuses on the instructions that told the jury the girlfriend was an accomplice as a matter of law, arguing that the instructions effectively, but unfairly, imputed guilt to him. From this premise counsel derives corollary arguments based on ineffective assistance of counsel and basic lack of a fair trial.

III. DISCUSSION

We reject Alcala's arguments for three independent reasons: (1) There was no error in giving the instructions; (2) any arguable error was invited; and (3) if there was any error, it was harmless because of the clear evidence of Alcala's guilt wholly independent of the girlfriend's testimony.

No error: CALCRIM Nos. 335 and 708 are both progeny of Penal Code section 1111, which requires corroboration of an accomplice's testimony for a criminal conviction.[5] Section 1111 can itself be traced back to the common law (see *People v. Guiuan* (1998) 18 Cal.4th 558, 565 (*Guiuan*)), which was based on the obvious incentive an accomplice has to lie in order to obtain some benefit from the prosecution. (See *ibid.*,

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"So out of caution, I'm going to give [CALCRIM No.] 708. If anything, [CALCRIM No.] 708 is a duplication of [CALCRIM No.] 335. It certainly doesn't prejudice the defendant. But I feel very uneasy in a special circumstance murder case not giving any instruction to the jury dealing with accomplice testimony as it relates to a special circumstance. So I'm going to give [CALCRIM No.] 708. I've already indicated the format in which it's going to be given, and it's my understanding that both parties agree with [CALCRIM No.] 708.

"Is the D.A. in agreement with that statement?

"Mr. Petersen: Yes.

"The Court: *Is Mr. Reed in agreement*?

"Mr. Reed: *Yes, your honor*.

"The Court: *And just so the record is clear, you want [CALCRIM No.] 708 given to the jury?*

"Mr. Reed: *Yes, your honor.*

"The Court: Okay. All right. Let's take a short recess. I'm going to grab the revised instruction on [CALCRIM No.] 708 and then we'll bring the jury in. And I'll start reading them the law." (Italics added.)

[5] All further statutory references are to the Penal Code. Section 1111 provides in its entirety:

"A conviction can not be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof. An accomplice is hereby defined as one who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given."

citing *People v. Coffey* (1911) 161 Cal. 433, 438.) Justice Kennard has noted, however, that section 1111 is itself much harsher (from the prosecution's point of view) than the old common law rule: "'Juries are now compelled rather than cautioned to view an accomplice's testimony with distrust, for while his testimony is always admissible and in some respects competent to establish certain facts [citation], such testimony has been legislatively determined never to be sufficiently trustworthy to establish guilt beyond a reasonable doubt unless corroborated.'" (*Guiuan, supra*, 18 Cal.4th at pp. 573-574 (conc. opn. of Kennard, J.), quoting *People v. Tewksbury* (1976) 15 Cal.3d 953, 967.)

Alcala's appellate argument here has a certain man-bites-dog quality to it. Defendants' *usual* complaint about accomplices is that the trial judge *didn't* give an instruction such as CALCRIM No. 335, and thus left it to chance whether a given witness was an accomplice, thereby failing to adequately protect the defendant from the danger of conviction based on the accomplice's testimony alone. (E.g., *People v. Hill* (1967) 66 Cal.2d 536, 555 (*Hill*) ["Defendants both claim that the court erred in instructing the jury in a manner which permitted it to conclude that Madorid was not an accomplice, and thus avoid the necessity of finding corroboration, when it appears and the jury should have been so advised that Madorid was an accomplice as a matter of law."].)

The reason defendants usually want such an instruction is obvious: As the judge noted here, it can only benefit a defendant. Its effect is to *increase* the prosecution's normal burden of proof. Such an instruction does not impute guilt to a defendant, because it is conditional: *If* the jury finds a given crime has been committed, *then* it is to view the testimony of a given witness as insufficient by itself to convict.

There sometimes arise, however, exotic circumstances in which giving such an instruction has been held to be prejudicial. In fact, a published decision in a case

involving such exotic circumstances is the centerpiece of Alcala's appellate argument, *People v. Johnson* (2016) 243 Cal.App.4th 1247 (*Johnson*).[6]

But the basic procedural facts in *Johnson* were unusual, to say the least. The case arose from a messy shooting at a campground with a background story reminiscent of a cut-rate version version of the Iliad.[7] For our purposes, the key elements in *Johnson* are these: Two defendants were tried jointly in front of the same jury (*Johnson, supra*, 243 Cal.App.4th at p. 1251) and each of them took the stand in their own defense, proclaiming innocence. Yet the trial court instructed the jury that, if a crime had been committed, each defendant was an accomplice as a matter of law.

Doing so was error (*Johnson, supra*, 243 Cal.App.4th at p. 1271), for essentially two reasons: First, since each defendant was claiming to be entirely innocent, giving an accomplice as a matter of law instruction – particularly when it was obvious a bloody crime had been committed – could *only* have the effect of imputing guilt to that defendant. (See *id*. at p. 1270, quoting dicta from *Hill, supra*, 66 Cal.2d at p. 555 ["'where a codefendant has made a judicial confession as to crimes charged, an instruction that as a matter of law such codefendant is an accomplice of other defendants might well be construed by the jurors as imputing the confessing defendant's foregone guilt to the other defendants'"].[8]) The court recognized employment of the instruction where two defendants each testified was problematic.

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6 *Johnson* was the subject of a grant and transfer to reconsider on the unrelated point of implied malice. (See *Johnson, supra*, 243 Cal.App.4th at p. 1252.) The version we cite is the final one after the trip up to the Supreme Court and back, which was finalized in the official reports only after Alcala's reply brief had been filed.

7 The wife of one of the defendants (Johnson himself) left him and joined up with a group of two or three other people at a local motel, and then later went to a campsite. Johnson came to the campsite looking to get her back and arrived with a group of associates. The assault didn't last as long as the siege of Troy, but it was still bloody, resulting in the death of the person who took the wife into his motel room. (See *Johnson, supra*, 243 Cal.App.4th at pp. 1252-1255.)

8 The *Johnson* court relied heavily on the Bench Notes to CALCRIM No. 335 which extracted from *Hill* the principle that the instruction should not be given concerning a codefendant who testifies. (See *Johnson, supra*, 243 Cal.App.4th at p. 1269.) In *Hill*, all three defendants were tried together, with but one taking the stand. (See *Hill, supra*, 66 Cal.2d at pp. 542-543, 547.) The *Hill* case thus implicated the same problem of trying codefendants in one proceeding as did *Johnson*.

It also noted the instruction, as applied to defendants who both take the stand directly undermined each defendant's constitutional right to take the stand and deny committing the crime. (*Johnson, supra*, 243 Cal.App.4th at p. 1271 ["Here, each defendant testified, and each denied that he was guilty of the crimes charged. Put another way, there is no contention that undisputed evidence established that defendants were accomplices."].)

This is not our case. Unlike *Johnson* (or *Hill* for that matter) there was no testifying codefendant here. The girlfriend was being prosecuted separately. And, contrary to Alcala's briefing on appeal, the fact the girlfriend was not being prosecuted before the same jury makes a difference. The point of *Johnson's* analysis on the dangers of CALCRIM No. 335 is the potential to steer the jury in the direction of the guilt of someone whose guilt the jury itself is supposed to be ascertaining in that very proceeding. Moreover, unlike *Johnson*, here the defendant himself did not take the stand, so there was none of the cross-ruffing against a *testifying* defendant that made giving CALCRIM No. 335 error in *Johnson*. Rather, the case before us was the usual dog-bites-man case where the defendant could only gain by the trial court telling the jury that one specific witness's testimony alone was insufficient to convict.

Any error invited, no effective assistance: In *Johnson*, the court rejected an invited error argument proffered by the Attorney General, because of the absence of a tactical reason on the record for acquiescing to CALCRIM No. 335. But one must remember that in acquiescing to CALCRIM No. 335 in *Johnson*, trial counsel for both defendants were directly undermining the credibility of their own testifying clients, i.e, counsel were thwarting their clients' "substantial rights" to be "judged with the ordinary rules for judging the credibility of witnesses." (*Johnson, supra,* 243 Cal.App.4th at p. 1267.)

We have nothing like that here. Alcala had nothing to lose and something to gain from CALCRIM Nos. 335 and 708. His erstwhile girlfriend's testimony could only hurt him.[9]

Finally, as a point of law, there is no doubt defense counsel *can* indeed waive objections to accomplice instructions. Our Supreme Court in *Guiuan* made that very clear: "At the prosecution's request, the trial court gave the standard instruction to view accomplice testimony with distrust. Guiuan did not object. Neither did she request modification. She may not be heard now." (*Guiuan, supra*, 18 Cal.4th at p. 570.) Indeed, the Court of Appeal in *People v. Miller* (1960) 185 Cal.App.2d 59 was even more direct: "If the allegedly objectionable instruction had not been given, it is more than likely that the defendant would now be complaining because of such failure. He may not sit silently during the course of his trial; create a situation which may be to his advantage or disadvantage and require the court to make an election on his behalf without being bound by that election." (*Id.* at p. 84.)

Basically, the same thing that happened in *Guiuan* and *Mille*r happened here. Trial counsel had a good reason to request two accomplice instructions and now appellate counsel tries to undo that clear tactical decision.

Any error harmless: While Alcala's briefing assiduously addresses the weaknesses of the informant as a witness – a drug dealer facing prison time with plenty of motive to lie – it ignores the most powerful evidence in the case: Her procuring a gun from Alcala which, according to ballistics testimony, was the very gun which fired the fatal shots. Alcala would not have had the gun to give to the informant unless he knew where it was, i.e., had been involved in the shooting. And that evidence was grounded in

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[9] The Supreme Court in *Guiuan* provides a go-to discussion of the problem of accomplices who provide both incriminating and exonerating testimony, and how instructions should be tailored so that pro-defendant testimony by an accomplice is *not* viewed with distrust. (See *Guiuan, supra*, 18 Cal.4th at pp. 564-569.) This case involves no such issue. The girlfriend's evidence from Alcala's point of view was all incriminating.

a sting operation set up by a police department in which the informant was given money, not just some overheard conversation.

The restitution order: The judge made a victim restitution order for $6,959, consisting of funeral and mental health expenses incurred by Sura's family. The filed order includes Isaac Martinez and the girlfriend (who is specifically named in the order, but omitted from the abstract of judgment) as co-offenders jointly and severally liable for the sum. The abstract of judgment simply omitted them. The Attorney General's office agrees the trial court should be ordered to amend the abstract of judgment to show the obligation includes Martinez and the girlfriend, and so do we.

IV. DISPOSITION

The judgment is affirmed except to the extent that we direct the trial court to amend the abstract of judgment to include Martinez and the girlfriend as jointly and severally liable for the $6,959 restitution order.

BEDSWORTH, ACTING P. J.

WE CONCUR:

IKOLA, J.

THOMPSON, J.